

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-1364

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANNETTE BONEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

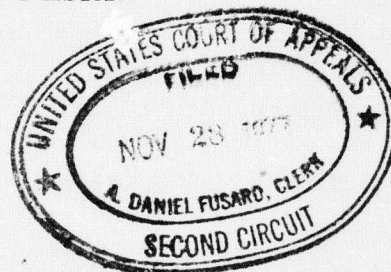
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UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

ISSUES PRESENTED

1. Whether there was sufficient evidence to establish that appellant had constructive possession of methaqualone in the Eastern District of New York to support the verdict on count three.

2. Whether the trial court's charge concerning constructive possession was reversible error.

3. Whether a new trial is required on court four because of the government's violation of the discovery rules in (a) failing to provide the defense with notice of its intention to introduce scientific evidence concerning ballistics comparison tests of the seized methaqualone tablets until the morning of trial; (b) failing to provide the defense with copies of the results and reports of the tests until immediately before the government's expert testified at the trial; and (c) failing to make the tablet presses used in conducting the tests available to the defense prior to or at the trial.

4. Whether the indictment should be dismissed for failure to state an offense against the United States because the procedure by which methaqualone was added to the Schedule of controlled substances in 21 U.S.C. § 812 was an unconstitutional delegation of legislative authority in violation of Article I, Section 1 and the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Preliminary Statement

This is a consolidated appeal by Annette Boney from judgments of conviction entered in the United States District Court for the Eastern District of New York on August 18, 1977 and September 29, 1977.

The four-count superseding indictment, No. 77-CR-47(S), was filed on May 2, 1977, and charged appellant with two counts of possessing with intent to distribute methaqualone, a Schedule II controlled substance, and one count of distributing the drug, in violation of 21 U.S.C. § 841(a)(1). The indictment also charged appellant and a co-defendant, Stuart First, with one count of conspiracy to possess and distribute methaqualone, in violation of 21 U.S.C. § 846.

The conspiracy count was severed and appellant was tried alone on the three substantive counts before Chief Judge Jacob Mishler and a jury from May 2-4, 1977. Appellant was found guilty on one possession count and was acquitted on the other two counts. On August 18, 1977, appellant (who is 24 years old) was sentenced to examination and report pursuant to 18 U.S.C. § 5010(e). Execution of the sentence was stayed pending appeal.

At a second trial, appellant and Stuart First were tried on the conspiracy count before Chief Judge Mishler and a jury from September 26-29, 1977. Appellant was convicted and Stuart First was acquitted. On September 29, 1977, appellant was sentenced to examination and report pursuant to 18 U.S.C. § 4205(c). Execution of the sentence was stayed pending appeal.

On October 14, 1977, a motion by the government to consolidate the appeals from the two judgments of conviction against appellant was granted by this Court.

Statement of Facts

An original three-count indictment, filed January 27, 1977, charged appellant with one count of possessing with intent to distribute approximately 60,000 tablets of methaqualone on or about November 15, 1976, one count of distributing the same tablets on that date, and one count of possessing with intent to distribute approximately 20 kilograms of methaqualone on or about December 21, 1976.

On the morning of May 2, 1977, the day trial of the above indictment was scheduled to begin, the government obtained a superseding indictment which realleged the three

substantive counts and added a conspiracy count against appellant and a co-defendant, Stuart First, alleging a conspiracy to possess and distribute methaqualone from October 22, 1976 to January 10, 1977.

Appellant was not ready to proceed with the added conspiracy count without additional time for preparation and the court indicated that the trial would therefore proceed as scheduled on the original three-count indictment (A.8a). However, after appellant moved to dismiss the original indictment based upon insufficiency of the grand jury evidence (S.Tr. 8-10)^{1/} it was agreed that the trial would proceed on the three substantive counts of the superseding indictment instead, and the conspiracy count would be severed. It was stipulated that by consenting to the severance appellant had not waived, but had expressly reserved, the right to raise the defense of double jeopardy should the conspiracy count be tried at a later date (S.Tr. 33-35).

^{1/} "S.Tr." refers to the transcript of the trial on the substantive counts and "A." refers to the appendix filed by appellant with this brief.

Trial on the Substantive Counts

The three substantive counts were based upon two alleged methaqualone tablet ("qualude") transactions between appellant and Michael Cantor, the government's principal witness. Cantor, who had been dealing in qualudes prior to ever meeting appellant, was arrested for possession of qualudes on December 20, 1976 and became a government informant the following day. (S.Tr. 57, 2.7, 2.78-2.79). He pled guilty to violating 21 U.S.C. § 843(b) (unlawful use of communication facility) prior to appellant's trial.

Cantor testified that he met appellant in October, 1976 at a Dallas clothing show while they were both associated with Rafique, Inc., a New York sweater importing firm. He approached her as a possible source of qualudes, which he wished to resell in New York. According to Cantor he and appellant consummated three qualude transactions between the end of October and the end of November, 1976. (S.Tr. 57-59, 2.3).

One of these transactions, allegedly occurring on November 17 and involving 60,000 tablets, was the basis of both count one (possession with intent to distribute) count two (distributing). Essentially, Cantor testified that he gave appellant \$68,500 in New York on November 16, and that she flew to Texas with the money and returned to his apartment in Forest Hills on November 17 with 60,000

qualudes. He paid her a balance of approximately \$50,000 a few days later. (S.Tr. 69-71). Another government witness, Robert Goldman, who was arrested with Cantor on December 20, 1976 and pled guilty to violating 21 U.S.C. § 844 (simple possession) prior to appellant's trial, testified that he was present in Cantor's apartment on November 17 when appellant delivered the 60,000 qualudes (S.Tr. 2.144-2.150). The jury found appellant not guilty on both count one and count two.

[cont'd following page]

The third substantive count was based upon an alleged shipment of methaqualone tablets from Texas to New York via Emory Airfreight. On December 21, 1976, after his arrest and while he was acting as a government informant, Cantor recorded a telephone conversation with appellant in which she described a package and advised Cantor of its shipment to him and that it could be picked up at Kennedy Airport in New York. Later that day, Cantor, accompanied by DEA Agents, claimed the package at the airport. It was found to contain approximately 25,000 qualudes, which were introduced in evidence at the trial. (S.Tr. 2.5-2.9, 2.17-2.21, 2.205-2.207)

At the close of the government's case, appellant moved for a judgment of acquittal on count three, arguing that at most the evidence established possession by appellant in Texas prior to shipment of the package, but did not establish possession in the Eastern District of New York, as charged in the indictment.

The motion was denied. The jury returned a guilty verdict on this count.

Post-trial Motions

After the first trial appellant filed written motions seeking post-conviction relief including, inter alia, the setting aside of the guilty verdict and entry of judgment of acquittal on the ground that the evidence was insufficient to sustain the conviction, and arrest of judgment as to count three and dismissal of count four on the ground that the indictment does not allege an offense against the United States in that the manner in which methaqualone was added to the Schedule of controlled substances was unconstitutional (A.110a). The motions were denied.

The district court also denied appellant's written motions to dismiss the conspiracy count on grounds of double jeopardy, and violation of the Speedy Trial Act, and for a bill of particulars. Appellant also requested an order at the conspiracy trial precluding the government from offering evidence concerning the transactions of which she was acquitted at the trial on the substantive counts. The government stipulated that such evidence would not be offered at the conspiracy trial.

Trial On the Conspiracy Count

The trial of appellant and Stuart First on the conspiracy count began on September 26, 1977. Michael Cantor was again the government's principal witness, and his testimony was similar to that given at the first trial.

On the second day of trial the government called Dr. Edward Sykes Franzosa, a forensic chemist employed by the Drug Enforcement Administration, as an expert witness. He testified concerning "ballistics" tests he performed on methaqualone tablets taken from the package seized by DEA agents at Kennedy airport on December 21, 1976 (the package allegedly shipped by appellant from Texas). He stated that based upon these tests, he had determined that the tablets in the seized package were made in a clandestine drug factory located in Dallas, Texas that had been under surveillance for several months, and which was broken up by DEA in August, 1977. (A. 67a-74a). DEA Agent Lloyd Clifton, the witness immediately preceding Dr. Franzosa, also testified about the Texas drug factory, and had identified four individuals who were arrested in connection with it. (A. 26a-51a).

The defendants were first advised of the government's intention to introduce the ballistics evidence the previous day, and were furnished with the written reports of the tests just prior to the witness's testimony. Because

of this, and because the tablet presses used in conducting the tests had not been produced, appellant objected to Dr. Franzosa's testimony on the ground that the government had not furnished material that was discoverable under Rule 16 of the Federal Rules of Criminal Procedure in advance of trial, and had thereby deprived appellant of a fair opportunity to challenge the evidence (A. 53a-66a). The trial court denied the motion and permitted the testimony.

On September 29, 1977, the jury returned a guilty verdict as to appellant, and a not guilty verdict as to Stuart First.

ARGUMENT

POINT I

THE CONVICTION ON COUNT THREE
OF THE INDICTMENT SHOULD BE
REVERSED AND THE INDICTMENT
DISMISSED BECAUSE THE EVIDENCE
DID NOT ESTABLISH CONSTRUCTIVE
POSSESSION BY APPELLANT IN THE
EASTERN DISTRICT OF NEW YORK.

The third count of the indictment, upon which appellant was convicted at the first trial, charged as follows:

On or about the 21st day of December, 1976, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant ANNETTE BONEY did knowingly and intentionally possess with intent to distribute approximately 20 kilograms of Methaqualone, a Schedule II controlled substance. (Title 21, United States Code, Section 841(a)(1)).

Essentially, this count was based upon the alleged shipment by appellant of a package containing methaqualone tablets from Houston to New York. There was evidence that such a package was shipped, via Emory Airfreight, on December 19, 1976. The government produced a copy of a "non-negotiable forwarder airbill," which named as consignee "Rafique, Inc. - Attn: M. Cantor, 1407 Broadway #1218, New York, N.Y.," and a tape recorded conversation between appellant and Michael Cantor (who was then a government informant) in which appellant

described the package and advised Cantor of its shipment to him. On December 21, 1976, the package was claimed by Cantor, accompanied by DEA Agents, at Kennedy Airport. It was seized by the Agents and found to contain approximately 25,000 methaqualone tablets.

There was no evidence, nor was it claimed, that appellant ever had actual possession of the package or any of its contents in New York. The government relied entirely upon a theory of "constructive possession" (A.7a, 18a-20a, 23a-24b).

At the close of the government's evidence appellant's oral motion for a judgment of acquittal based upon the lack of proof of constructive possession in the Eastern District of New York was denied (A. 10a-14a, 15a-16a). A similar motion filed in writing after the verdict was also denied (A. 110a).

This Court discussed the meaning of "constructive possession" of illegal drugs in United States v. Jones, 308 F.2d 26 (2d Cir. 1962) (en banc):

[Possession] has been interpreted by the courts to encompass power to control the disposition of drugs as well as mere physical custody. . . . Those who exercise dominion and control over narcotics are said to be in "possession" . . . and physical custody by an agent may be attributable to the principal. . . . We have said, moreover, . . .

that one having a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty, to a customer as a matter of course may be held to have constructive possession. . . .

308 F.2d at 30 (footnote omitted). Later, in United States v. Steward, 451 F.2d 1203, 1207 (2d Cir. 1971), the Court noted that constructive possession "is found only where the defendant has set the price for sale, or was able to assure delivery or had the final say as to the means of transfer. '[I]n all of the cases in which we have upheld a finding of constructive possession at least one of these indicia has been present.'" . . . [Quoting United States v. Febre, 425 F.2d 107, 111 (2d Cir.), cert. denied, 400 U.S. 849 (1970)].

Obviously, the indicia of constructive possession mentioned in the above cases must exist at the time of the alleged possession. The fact that an individual may have previously had the ability to "set the price for sale," "assure delivery" or determine the "means of transfer" cannot support a finding of constructive possession where the circumstances have changed and none of the factors is extant.

This was precisely the situation in the present case even if the government's evidence is assumed to be true. For even if appellant at one time possessed the package of

methaqualone tablets and caused it to be shipped from Texas to New York via Emery Airfreight, once the tablets were delivered to the carrier appellant relinquished her ability to control them. This is a necessary consequence of the fact that (a) the qualudes had been sold and shipped to Michael Cantor; (b) the package was shipped by interstate carrier under a straight bill of lading which named Cantor as consignee and an unidentified party (not appellant) as the shipper; and (c) the package was contraband.

It was clearly the government's theory at trial that the qualudes had been sold to Cantor by appellant and that he owed her the purchase price. There was no suggestion, or evidence, that the qualudes were shipped to Cantor as appellant's agent, to be disposed of pursuant to her directives. Rather, Cantor's only obligation to appellant, according to the government's proof, was to pay her the agreed purchase price. The intended possession of the tablets by Cantor would therefore have excluded further control by appellant. Moreover, since Cantor had actually been arrested and was acting as a government informant at the time of the shipment, appellant could not possibly have retained any ability to control the qualudes through him.^{2/}

^{2/} Similarly, Cantor's arrest precluded liability of appellant for his possession either as an aider and abettor or a co-conspirator.

Since the package of qualudes was shipped by common carrier in interstate commerce, the Federal Bills of Lading Act, 49 U.S.C. § 81, et seq., would normally be controlling as to the rights of the parties involved. See G.A.C. Commercial Corp. v. Wilson, 271 F.Supp. 242, 245 (S.D.N.Y. 1967)

Under the Act, where the goods shipped are assigned to a specified person (as opposed to the order of a person), the bill of lading issued by the carrier is referred to as a "straight" bill, and it must contain the notation "nonnegotiable" or "not negotiable." 49 U.S.C. §§ 82, 86. Under § 122, a "consignee" is "the person named in the bill as the person to whom delivery of the goods is to be made," while "consignor" is "the person named in the bill as the person from whom the goods have been received for shipment."

The bill of lading placed in evidence by the government in this case was a straight bill (it contained the notation "non negotiable") which named "Rafique, Inc. Attn: M. Cantor, 1407 Broadway #1218, New York, N.Y." (the actual place of Michael Cantor's employment) as consignee. The party listed as consignor was not identified at the trial, and appellant's name does not appear on the bill at all.

Under the Act, the consignee is deemed to have title to goods shipped under a straight bill of lading, and is entitled to delivery thereof. 49 U.S.C. §§ 88, 89; G.A.C. Commercial Corp. v. Wilson, supra, at 246; 13 Am.Jur.2d Carriers, §§ 416, 417; 13 C.J.S. Carriers, § 123, at 236-237. Here the consignee was Michael Cantor. While the true owner of goods may be able to assert a superior right to control delivery if he is actually the person "lawfully entitled to the possession of the goods" (see 49 U.S.C. § 89), this could not have occurred in the present case since the goods that were shipped were contraband, as to which no person could possibly establish a lawful property right. See 21 U.S.C. § 881. Therefore, as a practical matter, once possession of the package was given to the carrier, only Michael Cantor had the ability to control its delivery and regain possession of it.

United States v. Gitlitz, 368 F.2d 501 (2d Cir. 1966), cert. denied, 386 U.S. 1038 (1967), which also involved an interstate shipment of contraband by common carrier, provides a useful contrast to the present case. The defendant Gitlitz, while under government surveillance, shipped two footlockers containing marijuana from California

to New Jersey under a bill of lading which named a fictitious "Paul Brock" as consignee. After the footlockers arrived in New Jersey, Gitlitz hired Mel's Express, a New York delivery service, to pick them up at a New Jersey terminal and deliver them to him in New York City. He gave Mel's Express a letter, executed in the name of Paul Brock, authorizing release of the lockers, and also telephoned the New Jersey terminal and gave notice of this authorization.

The footlockers were then delivered to the New York City address specified by Gitlitz and signed for in the name Paul Brock by a co-defendant, Williams, who was present and told the deliverymen the lockers were his. Williams was immediately arrested, and Gitlitz was arrested in the street nearby a short while later. They were both charged and convicted of smuggling marijuana in violation of 21 U.S.C. § 176a.

In affirming Gitlitz's conviction, the Court rejected the contention that the activities of the government agents, who had actual possession of the footlockers

at various times after they were shipped in California, prevented Gitlitz from having the required "capability to maintain control" of the contraband, and held the evidence sufficient to support a finding of constructive possession:

the agents' actions in this case did not impair Gitlitz's constructive possession, which, as the court below found, was evidenced in part by his possession of the bill of lading controlling the lockers, his direction to Mel's Express to pick up the lockers, and his signing of the letter of authority permitting release of the lockers to the Mel's Express driver. (368 F.2d at 505).

The present case is distinguishable in every material respect. Here there was no direct evidence that appellant ever actually possessed the package of methaqualone tablets prior to its shipment from Texas to New York. But even more importantly, the evidence here established not that appellant shipped the package to herself, but that it was shipped to someone else, namely Michael Cantor. And as noted earlier, Cantor was actually named on the bill of lading as the consignee, and it was he, not appellant, who had the exclusive ability to control delivery once the package was placed in the custody of the carrier. There was simply no evidence that appellant had either the intention

or capability to maintain control over the package of methaqualone at any time after it was shipped, and specifically, after it arrived in the Eastern District of New York.^{3/}

For the above reasons, appellants motion for a judgment of acquittal as to count three, made orally at the close of the government's case, and in writing after the verdict, should have been granted.^{4/}

^{3/} Also compare United States v. Pardo-Bolland, 348 F.2d 316 (2d Cir.), cert. denied, 382 U.S. 944 (1965), another shipment case, where again the contraband was shipped to the defendants, and evidence of their continued dominion and control was established by their possession of baggage keys and claim checks.

^{4/} The government opposed these motions in the court below by arguing, in part, that this was only a defect in venue which had been waived since appellant had not moved to dismiss the indictment on the ground of improper venue prior to trial. However, even if this is viewed as a failure to prove proper venue, there clearly was no waiver, since (a) the indictment did allege venue in the Eastern District; (b) the government indicated its intention was to prove venue in the Eastern District (A. 7a, 18a-20a, 23a-24b); and (c) appellant argued this failure in the proof as a specific ground in support of a motion for acquittal at the close of the government's case (A. 10a-16a). See United States v. Gross, 276 F.2d 816, 819 (2d Cir.), cert. denied, 363 U.S. 831 (1960); United States v. Price, 447 F.2d 23, 27 (2d Cir.), cert. denied, 92 S.Ct. 232 (1971); United States v. Rivera, 388 F.2d 545 (2d Cir.), cert. denied, 392 U.S. 937 (1968).

POINT II

ERROR IN THE TRIAL COURT'S
CHARGE CONCERNING CONSTRUCTIVE
POSSESSION REQUIRES REVERSAL
OF THE CONVICTION ON COUNT THREE.

If, contrary to our argument above, the Court finds the evidence sufficient to sustain the guilty verdict on count three, the conviction still must be reversed because of error in the court's charge.

The trial court instructed the jury as follows concerning the law of possession as applied to Count Three of the indictment:

The law recognizes two types of possession. One is actual possession and the other is constructive possession.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. I am now in actual possession of my eyeglasses. I hold them in my hand. I have direct physical control over my glasses.

A person, although not in actual possession, knowingly has the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

I will read that again because there is a serious question as to whether the defendant had actual possession, if you believe the evidence in the case. It's an issue raised by the defendant.

I'm sorry. As to whether she had possession of the 25,300 pills that the Government claims was methaqualone, in New York. Because the Government's theory is that the possession was in New York and the possession over those pills was constructive possession.

The Government doesn't claim that the possession of those pills in New York was actual possession.

I will read that again. A person although who is not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons it is then constructive possession. The law recognizes also that possession may be sole or joint. One may have possession, actual, while the other may have constructive possession.

If you find that the element of possession, as that term is used in these instructions is present and you find that beyond a reasonable doubt, then you shall have found that one of the elements in the crime charged or a part of one of the elements of the crime charged has been proven.

One having title to and in actual possession of merchandise who thereafter ships the merchandise by carrier of his or her own choosing, by bill of lading to a purchaser, with instructions to the purchaser as to how and in what manner to receive the merchandise, retains constructive possession of the merchandise until delivery.

So, in this case, if the Government proves beyond a reasonable doubt that the accused had actual possession of the methaqualone

and that sometime on or about December 17th, 1976, that she shipped the qualudes via Emery Airfreight, and that she chose Emery Airfreight as the carrier and addressed the same to Michael Cantor, with instructions as to how and where to pick up the methaqualone, I charge you if you find all that, then as a matter of law, the defendant retained constructive possession, even though she had surrendered actual possession.

(A. 17a-20a) (emphasis added)

The underscored portion of the above charge, to which exception was taken (A. 21a-22a), was clearly a misstatement of the law, and most prejudicial.^{5/} It was tantamount to a directed verdict of guilty on count three provided only that the jury find that appellant shipped the package of methaqualone tablets from Texas. Yet, as discussed above, this factor alone certainly would not justify finding that appellant retained constructive possession of the

5/ The trial court also declined to include the following portions of Requests Nos. 4 and 5 submitted by appellant (A. 25a):

REQUEST NO. 4 -- Elements of Possession with Intent to Distribute

The essential elements of this offense, each of which the government must prove beyond a reasonable doubt, are:

FIRST: That on or about the date set forth in the indictment, the defendant ANNETTE BONEY possessed the controlled substance methaqualone within the Eastern District of New York;

* * * * *

[cont'd next page]

tablets subsequent to their shipment from Texas and arrival in New York. (See pp. 14-20 , supra). Because of this error, the conviction should be reversed and a new trial ordered.

5/ [cont'd]

REQUEST NO. 5 -- Definition of Possession

* * * * *

That the defendant ANNETTE BONEY may have possessed the substance methaqualone--either actually or constructively--at some time other than the occasions [sic] charged in the indictment, or in some place other than the Eastern District of New York, does not prove the element of possession for the offenses charged in this case. In this regard, it is to be emphasized that the defendant is on trial only for the acts and conduct specifically alleged in the indictment, and no others.

POINT III

THE GOVERNMENT'S FAILURE TO
PROVIDE THE DEFENSE WITH ADEQUATE
NOTICE OF ITS INTENTION TO
INTRODUCE EXPERT TESTIMONY
CONCERNING BALLISTICS COMPARISON
TESTS OF THE SEIZED METHAQUALONE
TABLETS AND TO PRODUCE THE
RESULTS AND REPORTS OF SAID
TESTS AND TABLET PRESSES USED
IN CONDUCTING THE TESTS, REQUIRES
A NEW TRIAL ON COUNT FOUR.

On September 27, 1977, the second day of the conspiracy trial, the government called as a witness Dr. Edward Sykes Franzosa, a forensic chemist employed by the Drug Enforcement Administration who was qualified as an expert witness. Over defense objection, Dr. Franzosa was permitted to testify concerning a scientific procedure by which he is able to identify the source of tablets by examining the markings that appear on them--a so-called "ballistics method" analagous to ballistics identification of bullets. He testified that through this procedure he had determined that the pills seized by the government at Kennedy airport on December 21, 1976 (which had allegedly been shipped by appellant to Michael Cantor) were made from pill presses that had been recovered during the seizure of a clandestine drug factory in Texas in August, 1977. Based upon this scientific evidence the government argued that the operation of the

Texas pill factory, and four men arrested in Texas in connection with it, were part of the overall conspiracy charged in count four of the indictment. (See A. 26a-51a, 67a-74a, 105a-109a).

Both defendants objected to this testimony on the ground that the government had first given notice of its intention to introduce this scientific evidence the previous day, and had not provided the defense with copies of the reports and results of the tests until immediately before the witness testified, and had not produced the presses used in conducting the tests at all. It was argued that the defense was thereby deprived of a fair opportunity to challenge this new and highly technical form of scientific evidence. (A. 53a-66a). However the court permitted the testimony nonetheless.

Both the test reports and the actual presses used in conducting the tests were clearly discoverable under Rule 16(a)(1)(C), (D) of the Federal Rules of Criminal Procedure. Many weeks before the first trial, items discoverable under this rule, including scientific test reports, were orally requested by defense counsel, and were provided by the government. As government counsel stated on May 2, 1977:

Just so the record is clear, Rule 16 material was turned over to Mr. Rothblatt's office well in advance of trial. . . .

(A. 9a).

Moreover, by letter dated April 18, 1977, defense counsel acknowledged the material that had been received as of that date, and specifically requested any further discoverable material to include:

Any and all documents, tangible objects, photographic film, or other items of physical evidence which (a) were obtained from or belong to the defendant; (b) the government intends to offer into evidence at trial; or (c) are material to the defense.

Results and reports of any and all scientific tests, examinations or experiments made in connection with this case, including the name of the test performed, and description of the method and procedure used.

(A. 114a).

In a subsequent letter dated July 22, 1977, sent prior to the conspiracy trial, defense counsel requested a bill of particulars, and also renewed "each of the discovery requests set forth in the letter dated April 18, 1977 previously sent to you in this matter. A copy of this letter is attached and incorporated herein."^{6/} (A. 118a)

^{6/} A copy of the discovery letter was also sent to the Court and to counsel for co-defendant Stuart First.

It is thus clear that sufficient "request," within the meaning of Rule 16, for the reports and objects used in connection with the test performed by Dr. Franzosa had been made prior to trial, and that pursuant to Rule 16(c), the government was obligated, under its continuing duty to disclose, to "promptly notify" the defense of the existence of this material.^{7/}

In the past, this Court has held breach of the discovery rules such as occurred here to be reversible error. In United States v. Kelly, 420 F.2d 26 (2d Cir. 1969), the Court reversed narcotics convictions where the government was permitted to introduce results of Neutron Activation Analysis

^{7/} When this arose at trial, there was some discussion of whether or not appellant had filed a motion for discovery of this material (A. 55a-56a). Clearly, however, there is no need for a motion unless the government specifically declines to furnish requested material. See Rule 3(e), Criminal Rules for the Eastern District of New York. Here there was simply no mention at all of Dr. Franzosa's test results. When the trial judge specifically referred to request under Rule 16, he refused to give counsel for appellant an opportunity to clarify the matter (A. 62a). Unfortunately, government counsel then erroneously stated that "counsel never requested scientific reports from me" (A. 64a).

tests when timely disclosure of the test results had not been made. Even though there was "quite substantial evidence" to identify the source of the narcotics without the scientific tests, the Court held that reversal was required because "the course of the government smacks too much of a trial by ambush, in violation of the spirit of the [discovery] rules." 420 F.2d at 29. See also, United States v. Baum, 428 F.2d 1325 (2d Cir. 1973); cf. United States v. Dioguardi, 428 F.2d 1033, 1038 (2d Cir.), cert. denied, 400 U.S. 825 (1970).

The prejudice that resulted from this unjustifiable breach of Rule 16 was substantial. The ballistics comparison procedure performed by the government's witness, Dr. Franzosa, is quite unique, and he is a highly specialized expert. Finding an equally qualified expert on behalf of the defense (without which the procedure could not possibly be challenged effectively) would be extremely difficult, if it is at all possible. Once such an expert was found, and retained, access to the presses seized from the Texas drug factory (which the government failed to produce) and time to perform independent tests, would be necessary. There was simply no way this could have been accomplished during the course of the three-day trial, and it would clearly be unreasonable to suggest otherwise.

Accordingly, the conviction on court four should be reversed and a new trial ordered.

POINT IV

THE PROCEDURE BY WHICH METHAQUALONE WAS ADDED TO THE SCHEDULE OF CONTROLLED SUBSTANCES IN 21 U.S.C. 812 WAS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY IN VIOLATION OF ARTICLE I, SECTION 1 AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

When 21 U.S.C. § 812(c) was enacted by Congress, methaqualone was not included as a controlled substance. It was added to Schedule II administratively in 1973 by the Attorney General pursuant to the provisions of 21 U.S.C. § 811. See United States v. Piatti, 416 F.Supp. 1202, 1202-1205 (E.D.N.Y. 1976). As she did in the district court, by way of a motion in arrest of judgment and for dismissal (A.110a), appellant challenges the constitutionality of 21 U.S.C. § 811 as an unlawful delegation of legislative power in violation of Article I, Section 1 and the Fifth Amendment of the United States Constitution.^{8/}

^{8/} We are aware that this Court recently rejected a similar argument in United States v. Pastor, 557 F.2d 930 (2d Cir. 1977) with regard to the addition of Phendimetrazine to Schedule III and Phentermine to Schedule IV. The Court is urged to reconsider the issue, especially since the Attorney General added methaqualone to Schedule II, thereby creating even more serious offenses than were involved in Pastor.

Of course, it is quite clear that Congress may, and frequently does, delegate legislative power to administrative agencies. It is even permissible for Congress to authorize such agencies to promulgate regulations, violation of which will be criminal. See cases cited in 1 Am. Jur.2d Administrative Law § 127.

We contend, however, that the delegation involved in 21 U.S.C. § 811 is unprecedented, and does not come within the principles or categories of delegation previously considered and upheld by the Supreme Court. This is apparent upon close examination of United States v. Grimaud, 220 U.S. 506 (1910), a leading case in the area of legislative delegation and criminal sanctions.

At issue in Grimaud was the validity of a statute which authorized the Secretary of Agriculture to issue regulations regarding the occupancy, use and preservation of federal forest reserve lands, and which provided that violation of any such regulation would be punishable as a misdemeanor. Pursuant to the statute, the Secretary issued a regulation requiring permits for grazing sheep on federal lands. The defendants, indicted for grazing sheep without

having obtained permits, challenged the statute as an unconstitutional delegation of legislative power to an administrative officer.

In upholding the statute, the Court noted:

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. * * *

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. * * *

From the beginning of the government, various acts have been passed conferring upon executive officers powers to make rules and regulations,--not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or measured by the injury done.

* * * [I]n making these regulations [in another case cited by the Court] the officers did not legislate. They did not go

outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

* * * [T]he authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

* * * A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

* * * The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, "contrary to the laws of the United States and the peace and dignity thereof."

31 S.Ct. at 482-485.

The legislative delegation here is fundamentally different in a number of material, and we submit determinative, respects from what was sanctioned above.

First, here Congress has not merely authorized an administrative official to "fill up necessary details" through administrative rulemaking. Rather, the Attorney General has in effect been given co-equal power to amend the legislation and define new crimes by adding controlled substances to Schedules already enacted by Congress.

Second, the task of determining what substances are to be controlled under the federal drug laws was not delegated to the Attorney General because of administrative expertise or other necessity. Congress was quite capable of enacting, and did in fact enact, the initial Schedules. Moreover, it was almost three years before the Attorney General first sought to amend the Schedules, indicating that rapid change in circumstances and the need for frequent amendment of the Schedules is also not a justification for the delegation.

Lastly, and perhaps most important, here Congress has not predetermined and fixed a particular criminal sanction. To the contrary, the Attorney General himself is given the power to determine the punishment, over an enormous range of severe sanctions, by placing a drug in a particular Schedule. See, e.g., 21 U.S.C. § 841(b) (from not more than one

year imprisonment and \$5,000 fine for Schedule V first offenders, to 15 years imprisonment and \$25,000 fine for Schedule I first offenders). It is precisely because the standards which differentiate the various Schedules are sufficiently vague and ambiguous, as to leave considerable room for discretion in placing a particular drug in one Schedule or another, that this delegation is impermissible.

The delegation standards contained in the legislation are of critical importance. The legislature must declare its policy with sufficient clarity and definable standards so as to establish definite guidelines for the administering agency to fulfill the legislative mandate. Panama v. Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). In the absence of such standards the agency, in effect, is permitted to make the law, and legislative power is unconstitutionally transferred rather than delegated.

The standards involved here are set forth in 21 U.S.C. 811(a), (c) and 812(b). We hardly need comment as to the defects of the eight factors set forth in Section 811(c) ("Factors determinative of control or removal from Schedules"), for an internal memorandum, authored by an HEW physician, has already stated the obvious:

These eight factors [found in § 811(c)] unfortunately are for the most part vague and redundant. The list exhibits circular reasoning and lack of parallelism, particularly when viewed together with the definitions of the schedules. Most importantly, the list of factors and the definitions of the schedules leave undefined the concepts of drug abuse potential, of drug dependence, and of risk to public health. In short, the factors provide little practical guidance in deciding particular cases. (emphasis added).

(Quoted in United States v. Pastor, 419 F.Supp. 1318, 1339 n.6 (S.D.N.Y. 1976), aff'd, 557 F.2d 930 (2d Cir. 1977)).

Section 812(b), which purports to define the five different Schedules, is certainly no better. It is based upon ambiguous and undefined terms such as "high potential for abuse," "potential for abuse less than [high]," "severe psychological dependence," "moderate or low physical dependence or high psychological dependence," "low potential for abuse," "low[er] potential for abuse," etc., which may ultimately mean the difference between punishment of one or thirty years in prison.

It was essentially for the above reasons that the Supreme Court of Mississippi, in Howell v. State, 300 So.2d 744, 781 (1974), struck down, as unconstitutional delegation,

a Mississippi controlled substance act modeled after the federal statute:

We hold that the authority to define crimes and fix the punishment therefor is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication We further hold that the attempted delegation of power to the State Board of Health is contrary to Article 1, Sections 1 and 2 of the Constitution providing for separation of powers of the government of the state into three departments. The State Board of Health is an administrative agency and as such is a part of the executive department of the state. When it rescheduled amphetamines from Schedule III to Schedule II, it increased the punishment of Howell in excess of that fixed by the legislature and thereby exercised legislative power. This infringes on the separation of the powers of government and is prohibited.

Finally, it should be emphasized that the violation of due process inherent in this delegation is underscored by the fact that the Attorney General is not an ordinary federal administrator, but the Nation's chief prosecuting officer. In effect, under this legislative scheme he is both enacting and prosecuting the federal drug laws. The situation brings to mind the very fears which are at the historical base of the separation of powers doctrine:

When the Legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because apprehensions may arise least the same monarch or Senate should enact tyrannical laws, to execute them in a tyrannical manner.

Montesquieu, B. 11, ch. 6.

In all tyrannical Governments the Supreme magistracy or the right both of making and enforcing laws is vested in the same man or one and the same body of men; and wherever these two powers are united together there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner since he is possessed, in quality of dispenser of Justice, with all the power which he as a Legislator thinks proper to give himself.

1 Blackstone, Commentaries 146.^{9/}

^{9/} As quoted in United States v. Ballard, 12 F.Supp. 321, 325 (W.D.Ky. 1935).

CONCLUSION

For the reasons stated in Points I and IV, the convictions should be reversed and the indictment dismissed. Alternatively, for the reasons stated in Points II and III, the convictions should be reversed and a new trial ordered.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

RICHARD WITHERS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1526 Webster Ave. Apt. B-3
Bronx, NY 10457.

That on the 28 day of NOVEMBER, 1977,
deponent personally served the within BRIEF FOR APPELLANT

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving true copies of same with a duly
authorized person at their designated office.~~

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

DAVID G. TRAGER
United States Attorney
Attorney for Appellee
225 Cadman Plaza East
Brooklyn, New York 11201

Richard Withers

Sworn to before me this

28th day of November, 1977 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930308
Qualified in Queens County
Commission Expires March 30, 1979

